IN THE SUPREME COURT

STATE OF ARIZONA

REPLY TO COMMENTS REGARDING PETITION TO AMEND RULES 16, 26, 26.1, 33, 34, 37, and 45, ARIZONA RULES OF CIVIL PROCEDURE	) Supreme Court) No. R-06-0034

Pursuant to Arizona Supreme Court Rule 28, George L. Paul, Robert H. McKirgan, and Robert G. Schaffer respectfully request permission to submit this reply to the two comments to their Petition to this Court to adopt amendments to Rules 16, 26, 26.1, 33, 34, 37 and 45 of the Arizona Rules of Civil Procedure.

We have delayed submitting this Reply to allow George L. Paul to attend the Arizona State Bar Convention, where he participated in a "roundtable" on these rules and where members of the Arizona Bar, and certain trial judges, gave their opinions on the issues as well. This additional information is included here for the Court, should it wish to consider this memorandum.

Introduction: A Unifying Policy Theme of Collaboration

Petitioners have reviewed the comments by John Messing and the Arizona State Bar. Both make excellent points throughout. None of their comments, suggested revisions to the proposed rules, or suggested

Interpretive Notes are objectionable to us or incompatible with any of the amendments as originally constituted. The common thread underlying the two comments is that electronic discovery must be handled cost effectively, particularly in the smaller cases one often finds in state courts. This happens through verbal and hopefully collegial communication between opposing counsel, and through agreements on how to handle technical and other discovery issues. Quite simply, the court system will be inundated if judges become involved too often in deciding the technical matters implicated by e-discovery. Accordingly, the key to any new rules in this area is a practicing bar that handles such issues by itself, and where involving judges is a last resort.

Electronic discovery, indeed, could foster increased collaboration among opponents in litigation practice. For the last 30 years, the unspoken assumption of the discovery rules has largely been that information is "free," and that anything that is conceivably relevant, or which might lead to discovery of any possible admissible information, is fair game, no matter how small the likelihood of importance, and no matter how large the cost. The cost of retrieving and producing information was almost always borne by the producing party as a matter of U.S. Supreme Court interpretation of the federal rules. Costs were and are almost never shifted.

However, with its implication of greatly increased volumes of information, vendors, processing, privilege reviews and new layers of specialists, the discovery of electronically stored information shows that the unspoken assumption of "free information" is no longer accurate. Information is not free – or even of low cost – anymore. Indeed, retrieving all of the conceivably relevant information in a case can make the discovery process too expensive to undertake in many cases in the Arizona Superior Court. In a $250,000 case for example, there may be two or three stores of data containing "discoverable information." However, it might cost $40,000 a piece to find out what is contained in the information stores.

How should the rules handle this conundrum? The "too-much-information-that-is-too-expensive-to-retrieve-and-review-and-not-that-important" problem is particularly pressing now that businesses possess up to 10,000 times as much information as they did a mere 20 years ago.[1] Indeed, e-discovery will force the litigation bar either to get a handle on discovery costs through collaboration and agreement, or our current discovery system may well become obsolete as too expensive for litigants.

Handling such discovery issues cost effectively depends on mutual exchange of helpful information by advocates, and collaboration within

[1] *See* Paul and Nearon, *The Discovery Revolution: E-Discovery Amendments to the Federal Rules of Civil Procedure* (2006)

defined parameters. As the Arizona State Bar's comment wisely points out, this is achieved through: (1) ***early*** and, if necessary, ***interactive*** meet and confer sessions that are institutionalized in the rules; (2) an invigoration of the proportionality rules already embedded in Federal Rule of Civil Procedure 26(b)(2)(C) and Arizona Rule of Civil Procedure 26(b)(1); and (3) mediation, and possibly mandatory mediation, if advocates cannot agree.[2]

The meet-and-confer process will by necessity comprise such subjects as technical issues, preservation, form of production, claw back, and "proportionality" of the discovery of different types or relevancies of electronic information stores. But in addition, in cases with large amounts of information, there will be issues of how to reliably use computer search and retrieval tools to find responsive information.[3] If search and retrieval cannot be done consensually, judges in Arizona will need to adjudicate the reliability of computer search and retrieval science, which would be time consuming and would stretch the competencies of the courts without full-scale *Daubert*-type hearings.

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[2] One noted U.S. Magistrate Judge notice that all his mediations were successful after he ordered the participants to videotape the proceedings.

[3] See draft whitepaper, The Sedona Conference Whitepaper on Search and Retrieval of Information, date May 2007; George L. Paul and Jason R. Baron *Information Inflation: Can The Legal System Adapt?* 13 Rich. J.L & Tech 10 (2007)

Specific Reply to John Messing's Comment

Mr. Messing's comment on pretrial conferences is a good one. Our opinion is that the same objective is met by early meet-and-confer sessions. If litigants cannot work issues out, then they can request a pretrial conference, but a pretrial scheduling conference should not necessarily occur in all instances, as the dynamic of cooperation is more important than meeting in front of a judge.

Mr. Messing's comments on the advisability of mandatory mediation is also well taken. The trial judges should have discretion to order mandatory mediation of e-discovery disputes in appropriate cases.

Mr. Messing's third comment makes sense, regarding encouraging litigants to approach discovery in phased approaches and having an early focus on the foundational and evidentiary issues of those documents that appear to be in dispute.

Specific Reply to Comments by the Arizona State Bar Association

The substance of the Arizona State Bar's comment is that "the petitioners' proposed amendments to Rules 16(b) and 26.1 . . . fall short of what is needed because they do not direct parties to confer at the outset of a case about electronic discovery issues, and because they do not provide the courts or parties with guidance about the issues they should address. . . . As

modified, the State Bar supports the petitioners' proposed rule changes and urges this Court to adopt them."

We agree. The changes suggested by the State Bar are a necessary part of adapting the pre-existing federal scheme of e-discovery to our Arizona scheme. Currently, the Arizona rules do not include a meet-and-confer process. Such a process should be instituted for e-discovery because of its complexity and the potential for crushing costs – as well for as other aspects of discovery.

Given that the Bar's primary suggestions attempt to implement the idea of a conference among opposing counsel, and to include an outline of topics for discussion, its suggested changes to the proposed rules, and the suggested commentary to the rules, are very helpful.

Arizona Bar's Suggested Changes to Rule 26.1 and 16.1

Concerning the change to Rule 26.1, the State Bar has made helpful comments with which we agree. One of its comments is the following:

> The proposed rule appears to invite a party to produce its electronic records without first conferring with the other parties about the format in which those records should be produced, which may lead to disputes if the chosen format is different from what the receiving parties prefer. It also might encourage parties to try to dictate the form of production by producing their electronic records in particular format before a receiving party has an opportunity to request some other format. The proposed rule change also lacks any requirements similar to those found in Federal Rule 26(f) directing the parties to confer over issues related to the preservation of such electronically stored information, or any issues relating to the relative accessibility of such information. It also does not tie together

> the provisions of Rule 26.1 with the proposed amendment to Rule 26(b)(1), which incorporates the federal rule provision in Rule 26(b)(2)(B) that allows a party to object to producing electronically stored information that it claims is not "reasonably accessible."
>
> To remedy these concerns, the State Bar recommends modifying the petitioners' proposed changes to Rules 16(b) and 26.1 in the manner shown in Exhibits A and B:

We believe that the Bar is slightly overstating the extent to which the proposed Rule 26.1 invites a wholesale production of electronically stored information without consultation or agreement on form. The proposed rule, instead, mentions the "listing" of electronically stored information by category if it is voluminous, and a general description of its identifying attributes. But the current language about producing it absent good cause does need to be changed in the way the Bar describes. Accordingly, we agree with the Bar's rewrite of the proposed rule found in Exhibit A.

On its redlined version of Rule 16.1, the State Bar has also made good suggestions, for the reasons it explains.

The suggestions about a full commentary to Rules 16.1 and 26.1 is critically important. At its page 10, the State Bar incorporates the wisdom of the Conference of Chief Justices about the "proportionality" issues discussed in the Introductory portion of this Reply:

> Consistent with The Conference of Chief Justices' guidelines regarding electronic discovery, the comment to Rule 16(b) should state that a court may choose to limit or impose conditions upon the disclosure of electronically stored information, taking into account (among other factors) "[its] relative accessibility," "the costs and burdens on the parties in

> making such information available, the probative value of such information, and the amount of damages (or the type of relief) at issue in the case." CONFERENCE OF CHIEF JUSTICES, GUIDELINES FOR STATE TRIAL COURTS REGARDING DISCOVERY OF ELECTRONICALLY-STORED INFORMATION 5 (approved August 2006) (noting that in determining discovery issues relating to electronically stored information, a court should consider these factors, among others). Including these factors in a comment would provide courts with guidance about how to exercise their discretion, especially in cases where the costs of producing particular types or formats of electronic records may start to approach (or exceed) the amount at stake.

This is one of the most profound observations in the Comment. Collaboration and honest discussion among counsel of the costs and burdens on the parties are simply critical in the litigation that takes place in our courts. A party should not be denied evidence that exists in electronic format. But neither should parties be put to crushing cost by having to review and produce every single electronic source. Electronic discovery thus will breathe new life into the proportionality doctrine originally written into Federal Rule of Civil Procedure 26(b)(2)(C) and Arizona Rule of Civil Procedure Rule 26(b)(1), but then, apparently, quickly disregarded. Reinvigorating the proportionality doctrine will go a long way toward curbing the ever increasing cost of discovery.

The State Bar's remaining suggestions are not radical, but they are important. The one innovation it suggests, which is in neither the new federal rules nor the rules we proposed, is that Rule 16(b)(1) be amended to allow trial courts to enter pretrial orders "*setting forth any measures the*

parties must take to preserve discoverable documents or electronically stored information."

In this regard, the Bar follows the Conference of Chief Justices rather than the federal rules. Accordingly, the Court must make a decision whether it wants to highlight the pre-existing authority of trial courts to enter preservation orders. The Commentary to the federal rule publication draft was that this might trigger an avalanche of preservation motions and for that reason, this particular provision was left out of the federal rule package. If the Court is fearful of such a result, it should avoid this. If not, the concept of preservation is appropriate to highlight. Parties already have preservation duties by common law and it should be the unusual case where a preservation duty is reduced to a pretrial order.

In summary, we have reviewed all of the State Bar's comments, suggested changes to proposed rules, and proposed commentary. We agree with the suggestions and are thankful the Bar improved our proposed rule changes so significantly. If the Court adopted the Bar's suggested changes to the proposed rules and its suggested comments, it could not go wrong if the Court's intent is to adopt the federal scheme, as tailored to Arizona, with some innovation thrown in from the Conference of Chief Justices.

Is the Entire Package Necessary?

But is the entire package necessary? Not necessarily. Is there a conservative middle ground? There is, with the following explanation.

About half the rules do function as an integrated whole. The grand policy is to recognize "electronically stored information" and give it "first class information status." The policy is then to encourage agreement among counsel about its disclosure and discovery, set out a structure for discussion and highlight certain issues that need to discussed, such as: (1) form of production; (2) agreements about privilege; (3) preservation of evidence; (4) timetables; (5) cost of production, and critically, (6) anything else the parties need to discuss to handle information that is complex, and which takes on a life of its own in modern enterprises, such as network design and the location of storage devices. It would be hard and impractical to adopt less than the full panoply of this integrated aspect of the e-discovery "package."

But three doctrines in the rules have a "stand alone existence" that permit their adoption, or not, as the Court sees fit.

First, the so-called "safe harbor" of proposed Arizona Rule 37(g), the counterpart of new Federal Rule 37(f), was considered by many to be unnecessary, as it basically tells trial judges what they already know: that

they should not sanction litigants when they are blameless, except in exceptional circumstances. Indeed, the former chair of the Civil Rules Advisory Committee, Shira Scheindlin, advocated against the rule and wrote a law review article on the subject. This safe harbor could be stripped out of these proposals without a domino effect on the other rules if the Court wants to gauge the federal experience with the "safe harbor" before adopting it.

As a general matter, there should be no unnecessary rules. They lead to unintended consequences and unnecessary litigation. Omission of this rule from the package, however, may be misperceived or misconstrued unless there is an explanation of why it was left out. Litigants might argue the Court implicitly suggested that sanctions are appropriate in situations in which a party met the "safe harbor" of the federal rules, and for this reason deleting this rule may not be advisable unless there is an explanatory comment. It depends on how proactive and independent the Court wants to be in tailoring its own rules.

Similarly, the "retrieval procedure" that is now proposed Arizona Rule 26.1(f)(B) [Federal Rule 26(b)(5)(B)] was controversial on the federal level and only passed the Standing Committee on Rules of Practice and Procedure by one vote. It was viewed as giving a temporary veto power to a litigant who claimed there was inadvertent production, without any time

restriction. The material could have been produced five years earlier, and then one week before trial there is "veto," putting the opponent to great expense in trying to retrieve information that is probably irretrievably intermingled in a large number of databases owned by co-counsel, client representatives, experts, on laptops and on home computers. There are no waiver provisions, and there is a necessity of a court proceeding on the merits.

Please note that this Rule is not restricted to electronically stored information, but applies to all information. It, too, could be taken out without too many reverberations if the Court wants to examine the federal experience first, but Rule 45 at least will need to be re-examined as the doctrine of retrieval is incorporated there as well.

Finally, the concept of information that is "not reasonable accessible," currently found in proposed Arizona Rules 26(b)(1) and 45(d)(1)(D), which mirrors Federal Rules 26(b)(2)(B) and 45(d)(1)(D), was controversial during the federal comment period. Many qualified commentators, such as Federal District Court Judges, respected U.S. Magistrate Judges, and the Magistrate Judges Association opposed the proposed rule as duplicative and an unnecessary elaboration on the pre-existing proportionality scheme in

Federal Rule 26(b). "Why invent a new scheme for back up tapes when they may not even be around in a couple of years?" was the thought.

Again, this boils down to a philosophy of rule making. If one wants to have many detailed rules, that spell out how to respond to situations that are subsets of situations already covered in more general rules (as "not reasonably accessible" is a subset of a proportionality issue), then one might like this rule.

If one is a minimalist, and believes in the "common law function" of judges and litigants being given broad guiding principles so as to respond differently in changing situations as technology evolves, then one might not like this rule on the books. The Civil Rules Advisory Committee made the debatable decision to leave the rule despite both scholarly objection and political protest.

But again, even if the Court does want to be minimalist with how it makes rules about proportionality in the electronic discovery context, it will need to do some explaining or many will read unintended things into the fact it took out the "not reasonably accessible" doctrine.

Conclusion

It is a pleasure commenting on these important issues. We urge the Court to adopt the proposed rules, as modified by the State Bar's suggestions.

RESPECTFULLY SUBMITTED this 23rd day of July, 2007.

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